

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

M&T ENGINEERING AND CONSTRUCTION LLC,

and

DONNIE SCRUGGS, an Individual

and

CONRAD MONACO, an Individual,

and

BRYAN SCRUGGS, an Individual,

and

SCOTT CHANEY, an Individual.

Julie Covell, Esq., for the General Counsel

Benny J. Harding, Esq., Leawood, KS, for the Respondent

Cases 14-CA-240972
14-CA-241119
14-CA-241121
14-CA-241333

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Overland Park, Kansas on October 2-4, 2019. The complaint alleges that the Respondent, M&T Engineering and Construction LLC, violated Sections 8(a)(1) of the National Labor Relations Act (the Act)¹ in April 2019² by threatening, interrogating, coercing and subsequently discharging the charging parties, Donald Scruggs, Conrad Monaco, Bryan Scruggs and Scott Chaney, because they discussed wages, hours and working conditions with each other. The Respondent denies the allegations and contends that Donald Scruggs, Bryan Scruggs and Monaco were discharged because of deficient performance after their first and only day of work. In Chaney's case, the Respondent denies that he was discharged.

¹ 29 U.S.C. Sections 151-169.

² All dates refer to 2019 unless otherwise stated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,³ I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company with an office and place of business in Overland Park, Kansas, is a contractor in the construction industry performing bricklaying services valued in excess of \$50,000 in states other than Kansas. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Kansas City Zoo Subcontract*

The Respondent is owned by a married couple, Tannaz (Tania) Tavakkoli and Majid (Max) Nowrouzi. Both are registered professional engineers with graduate degrees in civil engineering. Tavakkoli serves as president and manages the administrative functions of the business. Her responsibilities include bidding for contracts, processing invoices and handling payroll with the assistance of a part-time accountant. Nowrouzi, as the vice president, manages construction operations. Kenneth Burch is employed as an estimator and project manager. All are statutory supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act.

The Kansas City Zoo project was the Respondent's first job. The Respondent was awarded a subcontract by the general contractor, Centric. The subcontract was to be performed in several intervals and was to be compensated at prevailing wage rates in effect for Jackson County, Missouri. The job required the Respondent to employ bricklayers, laborers and operators. The prevailing wage rates were \$55.16 for bricklayers, \$44.60 per hour for laborers and \$40-42 per hour for operators.

The first phase was for the Respondent to lay the foundational blocks and then take a one-week break for the installation of plumbing. The bricklayers, also referred to as masons, were to lay the bricks; laborers were to pour the grout.

B. *Respondent Hires the Charging Parties*

After being awarded the contract, the Respondent recruited through online advertisements. After brief interviews, Nowrouzi hired five employees. He hired Donald (Donnie) Scruggs as a bricklayer, or mason, and entrusted him to run the crew as a working foreman. Donald Scruggs was provided with a set of the blueprints, and assured Nowrouzi that he could read them and was familiar with industry standards for rebar reinforcement. During his

³ On April 12, over the General Counsel's objection, I granted the Respondent's motion for leave to file its brief three days late. I did, however, grant the General Counsel one week to file a reply brief.

interview with Nowrouzi, Donald Scruggs was told that the Company bid was for each employee to install 160-180 blocks per man per day and that he would run the crew. He was told the crew would consist of five masons and three laborers on the crew. He also informed Donald Scruggs, as the foreman, that any overtime required office approval. Additionally, Donald Scruggs was to be compensated for attending preconstruction meetings.

Donald Scruggs did not have the required OSHA 10-card certification for a foreman, but Burch told him that he would be reimbursed. Donald Scruggs obtained the certification prior to the start of work and was reimbursed.

Bryan Scruggs and Monaco were also hired as bricklayers. Chaney was hired as a laborer and Anthony Riley was hired as an operator/laborer. During their respective interviews, Burch explained to each employee that it was a prevailing wage job, would last approximately six weeks and the ground rules, including the work hours. He explained that they would be paid for actual work time, not including commuting or shuttling to the work site. Burch also informed the employees that the start times, depending on the general contractor, would be either 7:30 a.m. to 4:00 p.m. or 8:00 a.m. to 4:30 p.m.⁴

C. The Initial Preparation

On Monday, April 1, Nowrouzi text messaged Donald Scruggs to be at the site “on April 3rd no later than 7:45 a.m.” On April 2, Nowrouzi sent Donald Scruggs the location where they were to meet and pictures showing that the concrete foundation had not yet been poured. Nowrouzi said that the concrete would be poured on April 4 and that there would be a meeting about that on April 3 “and you should join we will call you shortly.” Nowrouzi followed up later with a text message to be there “[t]omorrow 7:45 at the jobsite.” Donald Scruggs asked, “Ok, is it just me or are you going to be there also?” Nowrouzi replied, “I’ll be there at 7:45[.] I’ll bring a laborer and probably the operator (I’ve forgotten his name). I’ll talk to Ken about the operator[.] Don’t forget your hard hat[.] You will have a meeting at 2:00.”

At 7:00 a.m. on April 3, Nowrouzi text messaged Donald Scruggs: “Good morning Donnie Benjamin just said he is not able to join[.] Do you have anyone in your mind to join today as operator? Donald Scruggs told Nowrouzi that Bryan Scruggs was “coming down,” adding that he had been on the job since 7:00 a.m. Nowrouzi replied, “[g]reat, I’m on my way[.] Have you received the block?” Donald Scruggs answered in the affirmative.⁵

At 3:40 p.m., Donald Scruggs notified Nowrouzi that he “[j]ust finished on job with meeting.” Nowrouzi thanked him for the update. At 4:45 p.m., Donald Scruggs informed Nowrouzi about his plans to start laying blocks the following day:

⁴ Burch’s credible testimony regarding his statements to employees during the hiring process was not disputed. (Tr. 430-35, 450-55.)

⁵ Notwithstanding Burch’s instructions, Nowrouzi authorized Donald and Bryan Scruggs to work on April 3. Moreover, the testimony of Burch and Riley that the latter was present, but Donald Scruggs was not, when the rebar was delivered on April 3 was effectively refuted by Donald Scruggs’ reply to Nowrouzi’s text message at 7:00 a.m. that he was already at the site and the rebar had been delivered. (GC Exh. 5 at 1-2; Tr. 427-29, 496.)

I think we can plan on working but if it is raining hard then no. I told Conrad plan on 10 am, I will tell Bryan to come in depending on weather. I will need Tony and a driver for laborer. You prob need a respirator for the guy who mixes mud. First day ok without but will need when they are mixing.

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Nowrouzi replied by asking if Donald Scruggs was referring to Thursday or Friday. After Donald Scruggs said that he was referring to Thursday, April 3, Nowrouzi asked if “at least the 3-sides of the footing ready?” Donald Scruggs replied that “[a]ll footings are done they were pouring the end I’d (sic) building as I left, so let’s go for it tomorrow and hope it don’t rain.”
 10 Nowrouzi asked “[w]hat time do you need your bricklayers? 10?” Donald Scruggs replied that he “told Conrad to come in at 10 and Bryan at 7 that’s (sic) is all we will need for bricklayers.” Nowrouzi said “Ok, Anthony and Donnie Lock will join too.” Donald Scruggs replied, “perfect.” Nowrouzi then asked, “It’s 170 for the first course. You finish it tomorrow. Right?” Donald Scruggs replied, “That is the plan. Layout takes more time, Nowrouzi replied,
 15 “Anthony will be there early morning. Do you want Locke to be there at 10?” Scruggs replied, “I would like [Lock] there early also to get the mud made the mixer lined up all that. I need to get the silo filled and all that stuff. Nowrouzi said, “good” and Scruggs asked if he could put the “Lazer on the Charger so it is charged for the morning.” Nowrouzi replied, “will do.”⁶

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Donald Scruggs, Bryan Scruggs and Riley reported to the site on April 4 at 7:00 a.m. A truck delivered the rebar at about 8:30 a.m. Donald Scruggs left the site at 9:00 a.m.⁷ In the meantime, Nowrouzi texted Burch that “[w]e are short in mason and labor[.] Diego, Donnie Locke and Benji are already with another company.”⁸ At 1:26 p.m., Donald Scruggs reported his work hours to Nowrouzi: “8 hrs, Wed, 2 Hrs today.” Nowrouzi replied, “Ok Thanks.” Scruggs
 25 also reported to Nowrouzi by telephone that the rebar had been delivered and was being unloaded by Bryan Scruggs and Riley. He also told Nowrouzi that he discussed the project layout with the project superintendent and how the job was going to proceed. He informed Nowrouzi that would be leaving the job site to pick up his girlfriend at the airport. Nowrouzi did not express any concern to Donald Scruggs about the time that he left the job site.⁹

⁶ Nowrouzi characterized his relationship with Donald Scruggs as “awful.” With respect to the period prior to and on April 5, however, that assertion is not supported by the record. First, Nowrouzi’s testimony that he and/or Burch asked Donald Scruggs not to go to the site on Wednesday and Thursday is negated by Nowrouzi’s text messages stating otherwise. Second, there is not even the slightest hint in any of their communications prior to April 9 of acrimony between them. (Tr. 532-38.)

⁷ Donald Scruggs testimony that he was present on April 4 before leaving for the airport to pick up his girlfriend was corroborated by the credible testimony of Brian Scruggs, as well as Burch’s vague recollection that Donald Scruggs mentioned at the foreman’s meeting that he would be leaving early to pick up his “wife.” (Tr. 220-21, 243-44, 436.) Riley’s vague and speculative testimony that he told Nowrouzi on April 4 that Donald Scruggs never showed up that day was not credible since Nowrouzi confirmed Donald Scruggs’ hours of work for April 3 and April 4 by text message later that afternoon. (Tr. 499-500; GC Exh. 6.) Moreover, Nowrouzi did not dispute Donald Scruggs’ version of their subsequent amiable telephone conversation as to why he left early. (Tr. 546-47, 551-52.)

⁸ R. Exh. 16 at 1.

⁹ Nowrouzi’s testimony indicating that he took issue with Donald Scruggs leaving early on April 4 was not credible. Nor was it corroborated by the uncertain testimony of Riley, who was not sure of the days and incorrectly recalled that Monaco was also present on April 4 (Tr. 498-502, 551-52.) Donald Scruggs testimony, as well his text communication with Nowrouzi later that day, indicate otherwise and

D. April 5, 2019

On April 5, Donald and Bryan Scruggs, Monaco, Chaney and Riley (collectively referred to as the crew) reported to the job site between 7:00 a.m. and 8:00 a.m. The goal was to lay the first course of block around the perimeter of the building site. However, batter boards needed to hold layout lines and indicate the limits of the foundation had not yet been installed by the concrete crew. This made it difficult for Donald Scruggs to measure distances between the walls, but he measured anyway using marks made by the concrete crew using a laser level set to determine the floor height.¹⁰

The crew encountered a problem when Monaco was unable to get a new mixer started in order to mix a batch of mortar. He tried to resolve the problem but returned about 45 minutes later to report that the pull cord broke. The problem was ultimately fixed when an employee from the equipment rental returned to the site and turned on the safety kill switch.

After the mixer was activated, the crew proceeded to produce mortar and lay the first of course of bricks. Bricklaying started before the lunch break and continued thereafter. Nowrouzi assisted in carrying the blocks to the masons and was present throughout that process. At approximately 4:00 p.m., the crew finished laying the first course of blocks and the course was ready for the next step – grouting the blocks.¹¹ At that point, Nowrouzi told him to send Bryan Scruggs and Monaco home. Donald Scruggs told Nowrouzi that he needed them to stay and perhaps they might agree to work as laborers. Nowrouzi asked Donald Scruggs if they would work for laborers' wages and the latter agreed. Donald Scruggs then instructed Monaco and Bryan Scruggs to start grouting the blocks.¹²

Nowrouzi left the job site while they were grouting between 4:15 and 4:30 p.m. for about 30 minutes to buy a hose to wash the mixer. He returned as the crew was finishing the grouting. Nowrouzi told Donald Scruggs that they grouted the holes in certain blocks that needed to be left open every 32 inches for rebar to pass through vertically. Donald Scruggs suggested that the crew remove the blocks before the grout hardened, but Nowrouzi told him not to worry about it and that it would be taken care of later.¹³

were corroborated by Bryan Scruggs credible testimony (Tr. 50-54, 200-01, 271-72; GC Exh. 6.)

¹⁰ Donald Scruggs was present the day before but did not mention this issue to Nowrouzi. (Tr. 56-59.)

¹¹ Donald Scruggs did not dispute the credible testimony of Nowrouzi and Burch that he was instructed during the foreman's meeting and provided with the plans and specifications on how to lay and grout the blocks, which was also stated in the drawings. (Tr. 376-91, 436-38; R. Exh. 9-12.)

¹² I credited Nowrouzi's testimony on this issue. (Tr. 539-94.) Donald Scruggs equivocated and provided inconsistent testimony regarding their discussion about sending Monaco and Bryan Scruggs home at that point. (Tr. 59-64.) However, Bryan Scruggs acknowledged that Nowrouzi asked him to work as a laborer (Tr. 272.), while Monaco, although denying the allegation, conceded that he deferred to Donald Scruggs on this issue. ("Donnie and Max had their conversation that it was agreed that we should stay and finish the job."). (Tr. 334-35.)

¹³ When asked what caused him to look at the grout when he returned to the site, Nowrouzi was non-responsive and delved into a long-winded explanation of how he had explained the importance of the grouting component of the work to Donald Scruggs. (Tr. 393-94.)

When the crew concluded work on April 5, they were informed that work would resume about one week later after plumbing and electrical installations.¹⁴ Monaco and Bryan Scruggs were the first to leave at around 5:30 p.m. Donald Scruggs and Chaney left around 6:00 p.m. Nowrouzi and Riley remained.¹⁵ Nowrouzi told Donald Scruggs that he would keep track of the hours.¹⁶

E. *The Respondent Decides to Replace the Crew*

On April 6, Donald Scruggs text messaged Nowrouzi a picture of the mixer at the job site. Nowrouzi did not respond.¹⁷ By that time, however, he had already decided to replace Donald Scruggs. Later that afternoon, Nowrouzi contacted Diego Vinegas, a masonry foreman, who had previously applied to the Respondent. Vinegas was currently working on a masonry job in Dallas, Texas, but was interested in returning home to the Kansas City area. After interviewing Vinegas, Nowrouzi offered him the foreman position and asked if Vinegas could put together a crew to replace the current one. Vinegas said he was available immediately. However, Nowrouzi said that Vinegas was not needed until the work resumed on April 15.

F. *April 8*

At some time during the morning of April 8, Burch was notified by Brian Shields, Centric's project superintendent, that the block configuration was out of square as illustrated in a drawing emailed to him from Shields. Nowrouzi asked Burch if the problem was their mistake. Burch replied that he did not know for sure and suggested that he and Donald Scruggs remeasure the layout. Nowrouzi replied that Donald Scruggs was no longer the foreman.¹⁸

At 5:04 p.m. on April 8, Nowrouzi text messaged Donald Scruggs a photograph of the blueprint with a highlighted area and a note, "That's a \$1,500 mistake." Scruggs replied at 6:31 p.m. with a question, "\$100 a block?"¹⁹ Nowrouzi still did not inform Donald Scruggs that day that he was going to terminate him. However, at some point during the day, Nowrouzi called Vinegas and asked if he could start work the next day, on April 9. Vinegas accepted the offer, left Dallas and returned to Kansas City on April 8.

¹⁴ Although flummoxed by the grouting problem on April 5, there is no credible evidence that Nowrouzi took steps to replace the bricklayers until the next day when he contacted Vinegas. (Tr. 530-31.) I did not, however, credit Nowrouzi's testimony that he typed letters of termination for Donald Scruggs, Bryan Scruggs and Monaco at home during the evening on April 5. The letters were neither provided to the General Counsel in response to subpoena nor sent to any of the aforementioned individuals, even after they were terminated. (Tr. 401-02, 407-10; R. Exh. 15-17.)

¹⁵ Donald Scruggs and Nowrouzi were generally consistent as to the time when the crew stopped work. (Tr. 66, 358.) Riley on the other hand, had poor recollection of dates and times and incorrectly estimated that the work ended that day at 2:00 or 3:00 p.m. (Tr. 511-12.)

¹⁶ Nowrouzi did not dispute Donald Scruggs' credible testimony about this conversation. (Tr. 64-66.)

¹⁷ The Respondent erroneously asserts that Donald Scruggs was terminated on April 5 (Tr. 366.), although I credit Nowrouzi's explanation that he did not tell him he was terminated after receiving the text on April 6 because he does not respond to messages during weekends. (Tr. 361; GC Exh. 6.)

¹⁸ Shields' email to Burch on April 8 was not produced. (Tr. 438-40, 519-529; R. Exh. 12, 16.)

¹⁹ GC Exh. 7.

G. *April 9*

At 7:13 a.m. on April 9, Donald Scruggs text messaged Nowrouzi that he “fell on the job Friday and won’t be able to come in today my neck and lower back are killing me. I tripped on the rebar that was bent down for the floor. I may have to see a doctor. What do you suggest should I call Centric?” Nowrouzi replied, “No I’ve talked to Centric.” Scruggs replied that he “talked to Bryan the superintendent last night on phone.” Nowrouzi replied, “Ok I’ll call him now.”²⁰

At 10:34 a.m. on April 9, Donald Scruggs text messaged Nowrouzi asking “[a]re the paychecks ready yet?” Nowrouzi replied that the checks would be ready at 6:00 p.m. Scruggs replied that others were calling him about the paychecks and assumed that they should be told to go to Nowrouzi’s office. Nowrouzi replied that Donald Scruggs should have employees call him directly. Donald Scruggs agreed.²¹

At 1:47 p.m., Chaney contacted Nowrouzi about his check and the latter replied that he could come pick up his check later that afternoon. When Chaney picked up his check that afternoon, he believed the amount to be less than the full amount for the 10 hours that he had worked to that point. He attempted to discuss his pay with Nowrouzi and Burch, but they said that they were unable to talk to him at that time because they were in a meeting.²²

At 5:27 p.m. on April 9, Donald Scruggs text messaged Nowrouzi that he “didn’t pay me for my time I had 21 hours. I am calling [Centric] no OSHA payment.” Nowrouzi replied that he did not understand what Scruggs meant and the latter replied that Nowrouzi “shorted me in pay! I worked 11 hrs on Friday. And had 10 hrs before that. 21 hrs total.” Nowrouzi replied by asking if Scruggs called Centric. Scruggs replied that he would if he had to. Nowrouzi replied that he saw Scruggs “text a little bit late Otherwise I wouldn’t write your check until you do whatever you wanna do Your service is not needed anymore.” Scruggs replied that he would “file a lien on the property I am calling Centric right now.” Nowrouzi replied, “Don’t push me to force you to pay what you did wrong Centric will give you shit.” Scruggs replied by asking, “which doctor does your work comp want me to go to? I fell on your job Friday.” He also added that “I never told you this but you will average about 60 block per man per day that is what most other real contractors bid a job similar to this at. Good luck on your 160.” Nowrouzi replied, “You advise me on block Let me advise you on business behavior Don’t text/talk to anyone when you are angry You always should keep your friends.”

²⁰ Chaney confirmed to Nowrouzi that Donald Scruggs fell at one point on April 5. (GC Exh. 26 at 6.) However, Donald Scruggs’s claim that he previously tried to report an injury was not credible. He never told Nowrouzi about an injury during any of their conversations on April 5 or 8. Nor is there any proof of such a report. Scruggs only claimed an injury after Nowrouzi confronted him about the improper installation of the blocks and the \$1,500 cost. At that point, Scruggs disingenuously notified Nowrouzi that he would be unable to come into work the next day when in fact he knew that the Respondent would not resuming work until later in the week at the earliest. (GC Exh. 8 at 1-2.)

²¹ GC Exh. 8.

²² Chaney’s testimony that he tried to speak with Nowrouzi and Burch was unrefuted. (Tr. 289-91.)

H. *April 10*

On April 10, Vinegas met Nowrouzi and Shields at the job site, reviewed the plans and specifications. He also measured the distances between the first course of blocks that had been laid by the crew and determined that the distances between walls were about three to four inches too far apart. Vinegas and a laborer proceeded to demolish and replace the first course. It took six hours to remove the grout and cut the rebar over two to three days.²³

At 8:47 a.m. on April 10, Donald Scruggs text messaged Nowrouzi asking, “Are you going to pay for the 21 hours that I worked after injury?” And you never answered the question in which doctor I need to see for my injury? Nowrouzi replied:

Here is the last time I reply to you as you are a scam 1. You’ve been paid based on your hours and more text about it will be considered as harassment 2. Every injuries (sic) must be reported within 24 hours after the accident Plus the zoo has cameras everywhere and there are witnesses if you have got injured. Don’t text me again and go through the legal process. You will be sued if you lie.

Scruggs replied, “I will see you in court then. Thank you.” Nowrouzi reiterated his admonition to refrain from texting him and Scruggs replied with the same remark, adding that he would consider it harassment. Nowrouzi replied that he would “block” Scruggs’ check “for more investigation. The accountant might make a mistake.”

Up to that point, Nowrouzi had not mentioned to Donald Scruggs or any of the other crew members that they were being replaced by Vinegas’ crew. At 10:45 a.m., Nowrouzi text messaged Bryan Scruggs:

I’m going to do some changes in my field team. So far your service is not required in the field anymore. But I’m hiring office staff as estimator and project manager. Send me your resume if you have required skill and if you are interested in.

On April 10 at 11:40 a.m., Chaney asked Nowrouzi about the status of the zoo project. A few minutes later, Nowrouzi replied that the concrete was being poured on Thursday and “[w]e are going to the jobsite either Friday or Saturday.” He added that the “the Forman has been changed . . . Donnie and Bryan are not with us anymore.” Chaney asked if Nowrouzi would let him know when to return to the job and the latter said to “be ready for Friday or Saturday. I’ll text you a day in advance.”

Nowrouzi never contacted Chaney after that exchange about returning to work.²⁴ A few minutes later, however, Nowrouzi asked Chaney if he left with Donald Scruggs on Friday. Chaney said “yes we left same time.” Nowrouzi then asked if Chaney saw Donald Scruggs get

²³ Vinegas’ first day of work was unclear. He initially testified that he returned to the Kansas City area on April 8 and was to start the repair work the following day. Nowrouzi also testified that he met Vinegas at the site on April 9. (Tr. 531.) However, Vinegas, whom I found more credible than Nowrouzi, subsequently testified on cross-examination that he had not been to the site prior to April 10. (Tr. 466-71.)

²⁴ This finding is based on Chaney’s credible and unrefuted testimony. (Tr. 310.)

hurt. Chaney replied that he “was not aware of anything.” Three hours later, Nowrouzi asked Chaney if Donald Scruggs called him. Chaney did not immediately respond and Nowrouzi followed up about a half hour later: “I asked you a question Scott.” Chaney replied shortly thereafter, acknowledging that Donald Scruggs called him “and we talked.” Nowrouzi then
5 asked, “anything I should know?” Chaney replied, “Not really. When we left I didn’t notice anything. But I do remember him falling earlier in the day when we were setting the back corner. His pant leg got caught on a piece of rebar.” Nowrouzi replied that he would have the zoo check the cameras and that Donald Scruggs would “be in trouble for false information.” Nowrouzi pressed Chaney to tell him the truth and “if you want to tell me something else.”
10 Chaney reiterated that he saw Donald Scruggs fall at about 9:30 a.m. Nowrouzi then asked if Donald Scruggs told him why he terminated him. Before Chaney could answer, Nowrouzi asked if Donald Scruggs told him that Nowrouzi would fire Chaney as well like he “told the other guys he called (Anthony and Conrad and . . .).” Chaney did not recall Donald Scruggs mentioning that. Nowrouzi then informed Chaney that he terminated Donald Scruggs because “he put the
15 first course of the block out of place (in a wrong place)” and had to bring in another “team” to fix the error. Nowrouzi added that Donald Scruggs was “revenging now, calling everyone by false information” and added that he had no plans to fire anyone else unless they play “his dirty game.” Nowrouzi then asked Chaney if Donald Scruggs asked him how much Nowrouzi was paying him. Chaney replied that Donald Scruggs did not ask him about pay. Nowrouzi also
20 asked if Donald Scruggs asked if he had an OSHA-10 certification. Chaney replied that he did not think so.²⁵

At 12:11 p.m., Bryan Scruggs replied, “Max, ur clueless, good luck.” Nowrouzi replied that he “wouldn’t change the team if you guys had knowledge of masonry.” Bryan Scruggs
25 replied, “Lol ok. There’s a reason why everyone wants me.” Nowrouzi replied, “The reason is you guys even didn’t know how to start a brand new mixer and plus this photo [of the blueprint].” Bryan Scruggs replied that Nowrouzi was an idiot for lumping him in with the others. Nowrouzi replied that he was an idiot for hiring Donald and Bryan Scruggs. After several more exchanges, Bryan Scruggs said that he understood how Nowrouzi felt, but that he
30 “didn’t do anything wrong, I did what I was told and wanted to help make u money I’m not mad I just didn’t like to be blamed.” Nowrouzi replied that he understood.²⁶

At 1:18 p.m., Donald Scruggs text messaged Anthony Riley, confirmed that he had an OSHA-10 card, informed him that the prevailing wage rate for forklift operators was \$56.76 per
35 hour, and forwarded a copy of the applicable wage chart. The text exchanges between Scruggs and Riley concluded at 2:11 p.m.²⁷ Included in the exchange at 2:17 p.m. was an entry that Riley intended for Nowrouzi but mistakenly sent to Scruggs:

40 Just basic (sic) saying how you fired him and that I’m next to be fired. And he gave me his number in case you fire me.²⁸

²⁵ GC Exh. 26.

²⁶ GC Exh. 18 at 1-6.

²⁷ Riley corroborated Donald Scruggs’ testimony that the latter reached out to Riley about how much he was getting paid and what he was entitled to. (Tr. 89-91, 512-513, GC Exh. 13-14.)

²⁸ Riley confirmed Scruggs testimony – referring to Riley’s 2:17 p.m. text – that he mistakenly reported his discussion with Scruggs at page 4 of the October 10 text messages to Scruggs instead of Nowrouzi. (Tr. 95, 512-517; GC Exh. 13 and 14 at 4.) In any event, although Riley was not sure that he

Donald Scruggs also mistyped a portion of his reply to Riley, referring to himself when he meant to refer to Nowrouzi: "That's right I did! Was just trying to help you out." Riley replied, "I know."

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At 2:10 p.m. Nowrouzi texted Burch and complained that Donald Scruggs was texting his other employees.²⁹ At 2:48 p.m., Nowrouzi texted Donald Scruggs about his communications with the other crew members and a contentious exchange followed:

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So you called my other employees. Did they give you a shit? Did Anthony give you a shit? Did Centric give a shit?³⁰

Donald Scruggs replied, "No, I have a lawyer. Quit texting me. Harassment." Nowrouzi replied that:

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We just talked to Centric and Centric is gonna pay overtime as they are behind. My employees will make a good money but you
It's illegal to contact my employees asshole. Don't put yourself in a trouble.
They don't give you a shit. They like their job. Why are you BSing while they don't
listen to you. And instead they tell me immediately what you said
Asshole

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Donald Scruggs replied, "Prevailing wage job." Nowrouzi replied that he had "3 prevailing projects in a row" and would "get more and more. Others will get a good salary from prevailing wage as they are respectful and good worker[.] You will not." Donald Scruggs replied to "Quit texting" but Nowrouzi continued on with his rant about Scruggs contacting other employees:

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Who is such asshole to listen to you? Leaving a prevailing wage and be against his boss? Scott? Anthony? Conrad? Huh, who?

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At 3:01 p.m., Nowrouzi texted Donald Scruggs again stating, "He sent me your print screen."³¹ Scruggs replied, "Lol" which is commonly understood to mean, "lots of laughs." Nowrouzi dared Donald Scruggs to "tell me who" and Scruggs replied, "Smile it's a good day." Nowrouzi replied that "[t]hey didn't give you a shit. He sent me your print screen." Donald Scruggs said, "so" and Nowrouzi replied, "I know what I'm doing. I wouldn't be here if someone like you could take me down." Scruggs replied, "You don't know much really." Nowrouzi replied, "I know dummy You think I don't know what is happening. All of them you could fix it by an apology instead of threatening me. Scruggs replied, Talk to my attorney and don't text anymore do you understand? Nowrouzi replied, "Lol Don't call/ text my employees anymore asshole. Scruggs replied, "No need to I got all I needed." Nowrouzi replied, "You got

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forwarded the wage information from Scruggs on to Nowrouzi, the errant text indicates that Nowrouzi was in communication with Riley about Scruggs. (Tr. 518.)

²⁹ R. Exh. 16 at 2.

³⁰ GC Exh. 8-9.

³¹ GC Exh. 11 at 6, 12; GC Exh. 12 at 5, 10.

my ass lol.” Scruggs replied, “I wondered why your handshake was so weak. Lol.” Nowrouzi replied, “Lol Dummy I have no weak spot in my whole body including my handshake. Next time when you do something wrong in your job Apologize your boss and try to fix instead of doing bunch of crap. Scruggs replied, “No need to get emotional Max. It will all work out.
 5 [winking emoji] luck.”

Nowrouzi replied, “Emotional? Kiss my ass. You are emotional and calling people I told them whoever gives you a shit, he is after out.” Scruggs replied, “[t]hen quit texting me ok? Smile.” Nowrouzi replied, “[y]ou kidoo are not even my level[.] Just didn’t have to do
 10 anything[.] Wanted to tell you those guys have told me [.] Now shut up[.]” Scruggs concluded with by saying “Yes mam.”³²

I. April 11

15 On April 11, Nowrouzi text messaged Donald Scruggs that his paycheck was incorrectly calculated because the Respondent’s accountant was unaware of the applicable prevailing wage rates. However, the accountant would correct the mistake when he returned the following week and a check for the shortage would be mailed to Scruggs. Scruggs asked if the amount would
 20 cover the 21 hours that he worked during the week of April 1 but Nowrouzi said the number of hours worked was correct as previously calculated. Scruggs said that he was in the process of putting a mechanic’s lien on the project unless he was paid for 21 hours at \$55.16 per hour. Nowrouzi welcomed Scruggs to do as he wished but reiterated that the message was just to check on the correct mailing address. Scruggs replied that the address was as stated in the personnel
 25 paperwork, “if you understand English do u need interpretation help?”³³

At 2:38 p.m. on April 11, Nowrouzi text messaged Monaco and asked if Scruggs called him. Monaco replied that Scruggs had not contacted him and asked if he was working the next day. Nowrouzi replied that “[t]hey are pouring today. I’m waiting for them to let me know if we
 30 should work tomorrow or maybe Saturday. They have not let me know yet. Donnie is not with us anymore. He’s been calling other guys and [giving] them false information and panic them. Be aware of that.” Monaco replied, “Please let me know asap. Thank you. Sorry to hear about Donnie. He’s a good man. But the show must go on. I’m ready to work [Friday] and/or [Saturday]. Nowrouzi messaged Monaco later that about the need to correct his paycheck and send him another check because the accountant failed to apply the prevailing wage rates. At
 35 3:13 p.m., Monaco confirmed that his address did not change and said that Nowrouzi was “welcome to call me anytime concerning work. And would prefer a phone call concerning money.” He texted again at 3:44 p.m. stating that he preferred to pick up his check in person.³⁴

At 3:10 p.m., Nowrouzi text messaged Chaney to inform him that his paycheck had been
 40 calculated incorrectly because the accountant did not apply the prevailing wage rate. He informed Chaney that the accountant would be in the office on April 15 at 5:00 p.m. and would “recheck and will mail you the balance to the address in your employment document.” Nowrouzi also asked Chaney to let him know if his address had changed. At 3:54 p.m., Chaney

³² GC Exh. 11-12.

³³ GC Exh. 15.

³⁴ GC Exh. 22.

confirmed that his address had not changed. There was no mention by either Nowrouzi or Chaney as to a date for the latter to return to the job site.³⁵

5 At 3:11 p.m., Nowrouzi text messaged Bryan Scruggs that his wages had not been correctly calculated because the accountant did not apply the prevailing wage rate. He said that a check covering the shortage would be sent out the following week.³⁶

J. April 12

10 On April 12, Monaco followed up with a text message asking Nowrouzi for clarification about the shortage in his pay and to call him. Nowrouzi reiterated the explanation about the miscalculation by the accountant and that it was “not a big deal” because he would probably be getting a check for less than \$5.00. Monaco’s congenial tone changed at that point:

15 My check was \$55.16 an hr for 7 1/2 hrs. I clocked in at 7 am and worked a 10 hr day with a half hour lunch. That is a 10 hr day. You were there when I left at 5:30 pm. My check was 2 1/2 hrs short. That’s what u thought you were contacting me about when you said there was a problem.

20 Nowrouzi replied that “[it] should not be like that. According to you and Scott you guys showed up at 8:00[.] Then 8:00 to 4:00 – 0.5 lunch = 7.5[.] From which is an hour you guys were supposed to leave as I wanted labor grout the block. You guys accepted to stay as a labor to grout. Correct me if I am missing something. You should have 7.5 h as bricklayer and 1.5 as labor in your check.” Monaco replied that he “got there early to find out where to park and be
25 where I needed to be on time. Donnie put me to work as soon as I got there. And I was there when you and Donnie discussed us bricklayers staying late to help grout to finish what needed to be done. You agreed. So I worked 7-5:30 with a ½ lunch. That’s 10 hrs.”

30 Monaco quickly added, however, that he accepted Nowrouzi’s decision and was “still ready to start Monday as scheduled” and “willing to take the [loss] to keep my job.” Nowrouzi replied that compensable time was limited to time working at the site and asked if Monaco recalled being asked to stay after 4:00 p.m. as a laborer. Monaco replied that it was “okay” and “don’t worry about it. I’ve been paid for the day. We’ll call it good. I am a bricklayer. I get paid bricklayers wage. I made mud and grout. I filled the silo. Drove the forklift. I did what
35 needed to be done to do what had to be done. And that’s what I did when the block needed to be grouted. I made grout. I don’t give discounts to labor. Your laborers are not unqualified. But I pitched in and helped to get the job done. But like I said, don’t worry about it.”

40 Nowrouzi replied “I’m sorry about that. That’s what . . . Donnie told me and I did the same to Bryan. It’s fine. I write a check for the difference.” Monaco replied, “Well thank you very much. I appreciate it. Again, I look forward to the future with your company and what we can accomplish together. I am happy to be working with Ken again. I’ve known him for

³⁵ Contrary to the Respondent’s assertion, Nowrouzi’s statement did not revise his previous statement to Chaney on April 10 that he would text him a day in advance about returning to work. (GC Exh. 27 at 2-3; Tr. 297, 300, 310-11, 317.)

³⁶ GC Exh. 19.

many years. I hope it last a long time. I am excited to work at the zoo. And I promise I will do my best. And will continue to do what needs to be done, no matter what that task may be.”

Later that afternoon, Monaco followed up with Nowrouzi about when to pick up the check and “I’ll be ready first thing Monday morning.” After Nowrouzi told him to come pick up the check, Monaco said he did not want to bother Nowrouzi and would plan to be at work on Monday. After Nowrouzi replied to “come and take,” Monaco changed his mind: “No. It’s okay. I don’t want any hard feelings and don’t want put my job at risk.” Nowrouzi replied that “I’ve made it ready.” Monaco replied that he was on his way but Nowrouzi immediately replied that he “had to leave. Ken is waiting for you.” When he arrived at the Respondent’s office that afternoon, Burch walked him out and handed him a check for \$15.84. After Monaco had driven away, Burch called him and told him that he was terminated.³⁷

K. April 15

On April 15 at 3:10 p.m., Nowrouzi notified Chaney that “[t]here was a problem in your paycheck as the accountant was not aware of such issue in prevailing wage. The accountant will be in office sometime next week and he will recheck and will mail you the balance to the address in your employment document. Let us know if your address has been changed no later than . . .” Shortly thereafter, Scott confirmed that his address was the one on file.³⁸

L. April 23

On April 23, Bryan Scruggs texted Nowrouzi mocking him about a problem at the site regarding the installation of the steel plates. Nowrouzi denied that there was any problem with construction and asked why Bryan Scruggs was still mad. Bryan Scruggs said that he still had not yet received the check in the mail as promised. Nowrouzi assured him that he would be receiving a check for less than \$100 and offered to consider him for a job if he apologized. Bryan Scruggs rejected the offer and sarcastically suggested he would reconsider if Nowrouzi let him have sex with the female who handed him his check on April 9.³⁹

LEGAL ANALYSIS

I. THE PROTECTED CONCERTED ACTIVITY

Employers violate Section 8(a)(1) of the Act when they interfere with workers’ rights to engage in concerted activity for their mutual aid and protection. Thus, as a threshold matter, it must be determined whether each of the charging parties was engaged in such activity prior to his termination, or at least whether the Respondent believed they were. See *Hyundai Motor Manufacturing*, 366 NLRB No. 166 fn. 7 (2018) (“Applying *Wright Line*, we reach the same conclusion that the Respondent unlawfully discharged the employees because it believed they

³⁷ I credit Monaco’s testimony regarding his hours on the job over Riley’s vague and speculative testimony that the latter was always the first to arrive at the site around 8:00 a.m. (Tr. 325-42; GC Exh. 22-24.)

³⁸ GC Exh. 25, 27.

³⁹ Bryan Scruggs was unaware at the time that the female was Tavakkoli. (GC Exh. 20; Tr. 274-75.)

engaged in protected concerted activity”). The Board in *Myers I* explained that for activity to be “concerted” under the Act, it must “be engaged in with or on behalf of the other employees and not solely by and on behalf of the employee himself.” 268 NLRB 493, 497 (1984). For conversations between employees to be found to be protected concerted activity, they must involve more than “mere griping.” *Mushroom Transportation Co. v. NLRB*, 33 F. 2d 683 (3rd Cir. 1964). Actions of an individual are concerted where they are “a logical outgrowth of the concerns expressed by the group.” *Mike Yurosek & Son*, 306 NLRB 1037, 1038 (1992).

The wages and hours of concern to the charging parties are among the working conditions considered to be protected concerted activity. See, e. g., *Praxair Distribution*, 357 NLRB 1048, 1059 (2011) (“It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours...”); *Waco, Inc.*, 273 NLRB 746, 747-48 (1984) (employee discussion of wages is inherently protected activity). Additional discussion about Donald Scruggs’s alleged injury, even though it only directly impacted him, did not remove that conduct from the protection of the Act because compliant handling of workplace injury is an interest of all employees at a construction site. See *Fresh and Easy Neighborhood Market*, 361 NLRB 151, slip op. at 8 (2014) (protected concerted activity exists even when only one worker “has an immediate stake in the outcome” since coworkers have an interest where “next time it could be one of them that is the victim”).

A contrary conclusion is not required because Chaney’s protected concerted conduct occurred in conversations with Donald Scruggs *after* his dismissal. See *Emarco, Inc.*, 284 NLRB 832, 833 (1987) (discussion with non-employees are protected as long as “communication is related to an ongoing labor dispute” and not subject to any exception. An ongoing labor dispute is a broad term including “any controversy concerning terms, tenure or conditions of employment”); accord *Compuware Corp.*, 320 NLRB 101, 103 (1995) (“The Board has repeatedly held that employees may, with the protection of Section 7, communicate with third parties about matters relating to an ongoing labor dispute”). Third parties deemed to be employees also include recently terminated employees pursuant to the Board’s broad construction of the term. See *MEI-GSR Holdings, LLC*, 365 NLRB No. 76 n. 1 (2017) (“the Act’s broad definition of ‘employee,’ . . . includes applicants for employment, former employees, employees of other employers, and members of the working class, generally”); *Briggs Mfg. Co.* 75 NLRB 569, 571 (1947) (“employee” includes “former employees of a particular employer”).

In response to Donald Scruggs’ inquiry on April 9 on behalf of himself and other employees as to when paychecks would issue, Nowrouzi instructed him to have employees call him. Scruggs agreed and there is no other proof suggesting that Nowrouzi’s instruction was coercive in nature. After Bryan Scruggs picked up Donald Scruggs’ paycheck later that day and notified him of the underpayment, the latter complained and threatened to contact the general contractor. In response, Nowrouzi threatened to withhold any further payments if Donald Scruggs did that and then told him that he was terminated.

After he was terminated, Donald Scruggs contacted Riley and Chaney to discuss his injury on the job, which Nowrouzi alleged to be a lie, and the appropriate wages and hours for which they should be paid. Nowrouzi knew by April 10 that Donald Scruggs had discussed these issues with Riley and Chaney. He sent them photographs of the prevailing wage rates and reimbursement amount for OSHA fees.

Monaco, however, never engaged in such discussion with Donald Scruggs, as Nowrouzi learned on April 11. He complained to Nowrouzi about his paycheck that day but there is no credible evidence that he engaged in protected concerted discussions with other crewmembers.

II. CHANEY WAS NOT TERMINATED

The Board does not require “the use of formal words of firing, discharge, or termination” in order to conclude that the adverse action was unlawful. *FiveCAP, Inc.*, 331 NLRB 1165, 1201 (2000). Instead, the test is “whether the employer’s conduct would reasonably lead employees to believe that they had been discharged.” *Id.* Where the employer, through its words or conduct, creates ambiguity as to the existence of an ongoing employment relationship, “it is incumbent on the employer to clarify and remove any implication that the employee has been terminated.” *Id.*

Chaney was informed by Nowrouzi by text message on April 10 to “[b]e ready either for Friday or Saturday. I’ll text you a day in advance.” Further discussion and questioning occurred and Nowrouzi informed Chaney that Donald Scruggs had been fired but stated that he did not intend to fire anyone else. On April 11, Nowrouzi sent the same text messages to others regarding the accounting error and had Chaney confirm his address. There was no further communication between the two. There is no indication at any point by Nowrouzi that Chaney might be fired and, thus, he did not create the kind of ambiguity the Board prohibits. See, e. g. , *Pennypower Shopping News*, 253 NLRB 85, 85 (1980), *enfd.* 726 F.2d 626 (10th Cir. 1984) (discharge occurred where employer stated both that no one had been fired and the employees would receive their final checks in the mail); *FiveCAP*, 331 NLRB at 1201 (discharge occurred where employer directed employee to leave the premises and refused to answer when employee asked if he was fired).

In determining whether an employee was terminated, the Board has typically focused on the employee’s efforts to obtain clarity on the matter. See *Pink Supply Corp.*, 249 NLRB 674, 674 (1980) (“At worst [employer’s actions] created uncertainty that each party was equally well equipped to rectify”); *In re Lance Investigation Service Inc.* , 338 NLRB 1109, 1110 (2003) (“Even if there was ambiguity as to whether [employee] was discharged, [he] could have easily cleared the matter up”). Because Nowrouzi did not create ambiguity, Chaney failed to text or call Nowrouzi even a single time to clarify whether he still had a job when he did not hear from Nowrouzi, and there was no reason for Chaney to believe “further inquiries into the Respondent’s intentions [were] futile,” he was not discharged and therefore no unlawful termination can be found. *Pink Supply Corp.*, 249 NLRB 674, 674 (1980).

III. ADVERSE ACTION NOT ATTRIBUTABLE TO WAGE DISCUSSION

The credible evidence also failed to establish that Nowrouzi’s actions demonstrated animus towards the protected concerted discussions of his employees that led to the discharges of Donald Scruggs, Bryan Scruggs and Monaco. Animus can be found in the “timing of the discharge,” evidence of the employer’s hostility and other facts demonstrating that an employer’s proffered justification for an adverse employment action is pretextual. See *Wright Line*, 251 NLRB at 1090.

Nowrouzi's hostility towards Donald Scruggs was obvious, though it is difficult to pare off what is perhaps natural hostility toward an employee alleged to have made repeated racist comments, fabricated a workplace injury and engaged in time theft, and what is hostility in response to the protected activity. Moreover, Nowrouzi's comment to Chaney on April 10 that "I have no plans to fire anyone else, unless someone plays in his dirty game" during their conversation about Donald Scruggs's wage and injury complaints demonstrated hostility toward the protected discussions between Donald Scruggs, Chaney and Riley. Finally, the General Counsel also claims that Nowrouzi's texts to Donald and Bryan Scruggs offering to employ them again if they just apologize prove that the Respondent did not fire them due to incompetence, but rather, their protected concerted discussions over wages.

Nowrouzi was aware that Donald and Bryan Scruggs discussed their wages after Donald Scruggs contacted Nowrouzi about the alleged shortage on April 9. Additionally, Nowrouzi questioned Monaco and Chaney about whether they spoke to Donald Scruggs about wages, and sought to chill speech with unlawful threats made to and interrogation of Chaney on April 10. There is no doubt that Nowrouzi's actions demonstrated clear animus towards his employees discussions about wages and hours worked, as well as Donald Scruggs' alleged injury on the job.

Regardless of the animus that Nowrouzi displayed towards the protected concerted discussions of the charging parties, however, the fact remains that the discharges were not motivated by such conduct, but rather, his decision to replace them with another crew after the April 5th fiasco. Nowrouzi, clearly scrambling to rectify his underpayment of the crew in accordance with the prevailing wage rates for the project, insisted that employees speak with him about the problem, individually and not with each other. Nevertheless, the evidence established that Nowrouzi had already decided to replace the Scruggs cousins and Monaco with Vinegas' crew on or before April 9. The crew, and particularly Donald Scruggs as foreman, failed to follow established practices and the project plans and specifications by improperly placing and grouting the blocks.⁴⁰

The chronology of events thus precludes a finding that their discharges were attributable to any discussions about wages on or after April 10 since the Board's causation test requires more than merely proof of animus towards protected activity. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (2019) ("To meet the General Counsel's initial burden, the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee.").

Since the evidence established that Nowrouzi terminated the Scruggs cousins and Monaco for reasons other than protected concerted activity, the Respondent also meets any *Wright Line* burden shift requiring that it prove "that it would have taken the same action even in the absence of the employee's protected activity." 251 NLRB 1083 (1980). His decision to terminate them for incompetence, even with his own faulty supervision factored in, preceded his hostility towards their protected concerted discussions. See *Summit Logistics*, 337 NLRB 927 (2002) (no violation where protected conduct was a motivating factor in decision to terminate but

⁴⁰ As previously noted, I did not credit Nowrouzi's testimony that Donald Scruggs was fired because of rude comments about Nowrouzi's ethnicity and English language abilities. There was only one such text message from Donald Scruggs *after* he was terminated.

employer proved that it would have discharged the employee because of his inadequate performance anyway).⁴¹

IV. CHANEY’S UNLAWFUL INTERROGATION

While incompetence and replacement of the entire crew at once constitute legal justifications for the terminations, there is no justification for Nowrouzi’s interrogations of Chaney and Monaco on April 10 and 11, respectively. An employer interrogates employees in violation of the Act if “under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.” *Blue Flash Express, Inc.*, 109 NLRB 591, 593 (1954). The Board specifically recognized certain relevant factors in *Rossmore House*: “[1] the background, [2] the nature of information sought, [3] the identity of the questioner, and [4] the place and method of interrogation.” *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985) (citing *Rossmore House*, 269 NLRB 1176 (1984)).

Chaney was aware that Nowrouzi was annoyed about the discussions between Donald Scruggs and the other employees because Nowrouzi said as much in a text message on April 10: “I have no plans to fire anyone else, unless someone plays in his dirty game” . . . “He is revenging now, calling everyone by false information [.]” Nowrouzi then requested information as to the protected discussion between Chaney and Donald Scruggs by asking if they discussed wages or OSHA 10 cards. Under the circumstances, Nowrouzi’s comments to Chaney and Monaco and other employees, coupled with his inquiry as to their participation in those discussions, unlawfully restrained Chaney and Monaco in violation of Section 8(a)(1) of the Act.

V. RESPONDENT UNLAWFULLY THREATENED CHANEY

“The Board has held that threatening employees with reprisals for engaging in union or other protected concerted activities is coercive to the exercise of their Section 7 rights under the Act.” *UPMC Presbyterian Shadyside*, 366 NLRB No. 142 (citing *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010)). This applies both to express and implied threats. *Id.* Because the discussions of wages and the OSHA 10 card are protected concerted activity, statements by Nowrouzi which impliedly threatened reprisal violated Section 8(a)(1) of the Act. *Avondale Industries, Inc.*, 329 NLRB at 1064, 1094 (1999) (“unspecified reprisals” were unlawful where manager said “how could you have [worked with the Union]”). More recently, the Board took a stricter view than *Avondale* without abrogating it. See *Amnesty International*, 368 NLRB No. 23 slip op. at 2 (2019) (declining to find coercive threats or interrogation where a supervisor stated she perceived a petition to be “litigious,” “adversarial,” and “sort of levy[ing] a threat”). Additionally, the Board has found that employers are not permitted under the Act to threaten to fire other employees in statements made to a former employee. *L. D. Brinkman*

⁴¹ Nowrouzi’s text messages expressing a willingness to hire Bryan Scruggs as a project coordinator immediately after discharging him and to Donald and Bryan Scruggs offering to rehire them in the future if they apologized, do not evidence pretext for the discharges. The record as a whole suggested that Nowrouzi primarily blamed Donald Scruggs for the improper placement and grouting of the blocks, and a new crew of bricklayers was hired to replace the crew. With respect to the alleged reinstatement offers if Donald and Bryan Scruggs apologized, the facts also preclude pretext because he had no intention of rehiring them, especially after the extensive exchange of insults that transpired.

Southeast, 261 NLRB 204, 210 (1982) (unlawful threat where employer told a recently-resigned employee it “would fire only those ‘heading up the union organization’”).

In the present case, Nowrouzi threatened Chaney. Nowrouzi told Chaney over a text message that he would fire those who “play in [Donald Scruggs’] dirty game.” In context, the “dirty game” would reasonably be construed either as discussing wages and the like with Donald Scruggs or helping to verify his injury, which Nowrouzi believed was a fiction. Chaney had already confessed during Nowrouzi’s unlawful interrogation that he discussed both issues with Donald Scruggs and he had seen him fall on the jobsite. Thus, under *Avondale*, Nowrouzi threatened Chaney with unspecified reprisal. 329 NLRB at 1094.

CONCLUSIONS OF LAW

1. The Respondent, M&T Engineering & Construction LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by (1) interrogating employees on April 10 and 11, 2019 about their protected concerted activities, and (2) threatening to terminate employees on April 10, 2019 if they engaged in protected concerted activities.

3. All other complaint allegations not specifically described above are dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴²

ORDER

The Respondent, M&T Engineering & Construction LLC, Overland Park, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating about their protective concerted activities, specifically discussions about wages and hours worked.

(b) Threatening to terminate any employees if they engage in discussions about pay about Wages and hours worked.

⁴² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Overland Park, Kansas copies of the attached notice marked "Appendix."⁴³ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] [members] [employees and members] are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 2019.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 26, 2019



Michael A. Rosas
Administrative Law Judge

⁴³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you or threaten you with termination because of your protected concerted activity, including participating in discussion about wages and hours worked.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

M&T Engineering & Construction LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677
(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14-CA-240972 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3014.